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ENERGY BILL PREEMPTS STATES AND LOCALITIES

PREPARED FOR

REP. HENRY A. WAXMAN

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EXECUTIVE SUMMARY

Shortly after he was elected, President Bush met in Crawford, Texas, with Republican governors to discuss energy issues and other priorities of the new administration. The President told the governors: "While I believe there's a role for the federal government, it's not to impose its will on states and local communities."

Over four years later, the Congress is poised to pass the President's energy legislation. Yet contrary to the President's assurances to the governors, the pending energy legislation transfers fundamental powers from state and local governments to the federal government in Washington, D.C. The House energy bill, which the Administration has endorsed, contains provisions that preempt or limit state authority in 11 key areas. The Senate bill also transfers significant powers from the states to the federal government.

At the request of Rep. Henry A. Waxman, this report analyzes the impact of the energy legislation on state and local authorities. It finds that the House-passed bill:

- Preempts state authority over the siting of energy transmission lines, Liquefied Natural Gas (LNG) terminals, and oil refineries.
- Limits state authority to require gasoline and other fuels to meet state "clean fuel" requirements.
- Restricts state authority to prevent leaks or dangerous conditions at underground fuel storage tanks.
- Preempts state energy efficiency standards.
- Erodes state authority over management of coastal areas.
- Limits state participation in federal decisions to license environmentally damaging hydroelectric dams.
- Blocks state lawsuits to clean up MTBE contamination of drinking water.
- Cuts state oil royalty revenues by hundreds of millions of dollars.

The report finds that the Senate-passed energy bill also preempts or restricts important state rights, such as state authority over the siting of energy transmission lines and LNG facilities.

As the report documents, the energy legislation — especially the House version — represents a triumph of federal authority over state and local autonomy. Multiple provisions in the legislation replace state and local control over energy policies that affect local communities with the judgment of a single federal agency or political appointee in Washington.

I. BACKGROUND

President Bush has repeatedly promised to return power to the states. Prior to his inauguration in 2001, there were widespread expectations of federal deference to state and local authority.[1] Governor Tom Ridge of Pennsylvania, who subsequently became the Secretary of Homeland Security, observed, "George is more inclined than the current administration to trust state legislators and governors — Democrats and Republicans — to make decisions."[2] Governor Michael Leavitt of Utah, who subsequently became the Administrator of the Environmental Protection Agency and then the Secretary of Health and Human Services, said he believed that the new Administration would be pervaded by a philosophy favoring the devolution of power to the states.[3]

At a meeting in Crawford, Texas, with Republican governors shortly after he was elected, President Bush stated: "While I believe there's a role for the federal government, it's not to impose its will on states and local communities. It's to empower states and people and local communities to be able to realize the vast potential of this country."[4] On February 26, 2001, President Bush stated, "When the history of this administration is written, it will be said the nation's governors had a faithful friend in the White House."[5]

The energy legislation pending before Congress provides a test case of the federal-state relationship under President Bush. Historically, our nation's energy policy has been developed cooperatively by federal, state, and local governments. The federal government has had important responsibilities, such as regulating interstate sales of electricity and natural gas and setting minimum national health, safety, and environmental standards for energy production activities and facilities. But state and local governments have also had important roles. These include approving retail rates for electricity and natural gas, enhancing energy supplies and reliability by adopting and implementing energy efficiency and conservation measures, and protecting public health and the environment from deleterious effects of energy production through siting, permitting, and enforcement activities.

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1 *Shifting of Power from Washington is Seen Under Bush*, New York Times (Jan. 7, 2001).

2 *Id.*

3 *Id.*

4 *Bush Seeks GOP Governors' Help*, Dallas Morning News (Jan. 7, 2001).

5 *Remarks by the President at National Governors' Association Meeting* (Feb. 24, 2001) (online at www.whitehouse.gov/news/releases/2001/02/20010226-8.html).

At the request of Rep. Waxman, this report examines how the pending energy bills affect this federal-state partnership. The House energy bill, the Energy Policy Act of 2005 (H.R. 6), has been passed by the House in similar forms in three separate Congresses: in August 2001 in the 107th Congress;[6] in April 2003 in the 108th Congress;[7] and in April 2005 in this Congress.[8] Each time, the legislation was endorsed by the Bush Administration. In its "Statement of Official Policy" issued on April 20, 2005, the Administration stated that it "strongly supports" H.R. 6.[9] President Bush described the legislation as "a good bill" in his June 11, 2005, radio address.[10]

The Senate has also passed energy legislation three times, though there has been more variation among the Senate versions.[11] In this Congress, the Senate version of the legislation, also entitled the Energy Policy Act of 2005 (and numbered H.R. 6), but containing different provisions from the House bill, passed in June.[12] It was also endorsed by the Bush Administration.[13]

The two bills are currently being considered by a House-Senate conference committee.

II. FINDINGS

The House energy bill and, to a lesser extent, the Senate bill rewrite the federal-state partnership that has shaped energy policy in the United States. In 11 key areas — from the siting of massive energy facilities on our nation's coasts to the filling of underground fuel tanks in isolated rural areas — H.R. 6 strips state and

6 H.R. 4, 107th Cong. (House-passed version) (Aug. 2, 2001) (Passed by recorded vote: 240 - 189).

7 H.R. 6, 108th Cong. (House-passed version) (Apr. 11, 2003) (Passed by recorded vote: 247 - 175).

8 H.R. 6 (House-passed version) (Apr. 21, 2005) (Passed by recorded vote: 249 - 183).

9 Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 6 — Energy Policy Act of 2005 (Apr. 20, 2005) (House).

10 President George W. Bush, *George W. Bush Delivers Weekly Radio Address*, FDCH Political Transcripts (June 11, 2005).

11 H.R. 4, 107th Cong. (Senate-passed version) (Apr. 25, 2002) (Passed by recorded vote: 88-11); H.R. 6, 108th Cong. (Senate-passed version) (July 31, 2003) (Passed by recorded vote: 84-14); H.R. 6 (Senate-passed version) (June 28, 2005) (Passed by recorded vote: 85-12).

12 H.R. 6 (Senate-passed version) (June 28, 2005) (Passed by recorded vote: 85-12).

13 Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 6 — Energy Policy Act of 2005 (June 14, 2005) (Senate).

local governments of their traditional authorities and shifts power to federal agencies in Washington, D.C. The Senate energy bill undermines state and local authorities in several of these same areas.

1. Preemption of State Authority over Transmission Lines

States and local governments have long exercised the authority to approve the siting of transmission lines to protect the environment and ensure reliable service. H.R. 6 gives this traditional state and local authority to Department of Energy (DOE).

Under section 1221 of H.R. 6, DOE may designate "interstate congestion areas" within which state and local authority to deny or condition transmission line permit requests is severely limited. If a state denies a permit, places certain conditions on a permit, or has not acted on a permit within one year for any reason, including lack of information provided by the applicant, DOE can step in and issue the permit.

In addition, the section intrudes on long-standing state and local eminent domain authority. Under section 1221, electric utilities that have received a permit from DOE to construct a power line over state objections can petition federal court for the right to exercise the power of eminent domain over private property in order to construct new transmission lines.

This section directly conflicts with the policy of the National Governors Association on the siting of transmission lines, which states:

> Governors oppose preemption of traditional state and local authority over siting of electricity transmission networks. Governors recognize that situations exist where better cooperation could improve competition and reliability. Governors are willing to engage in a dialogue with the federal government and industry to address these situations in a manner that does not intrude upon traditional state and local authority.[14]

The Senate energy bill contains similar provisions preempting state authority over transmission siting.[15]

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[14] National Governors Association, NR-18. Comprehensive National Energy and Electricity Policy (2003).

[15] H.R. 6 (Senate-passed version) § 1221.

2. Preemption of State Authority over Liquefied Natural Gas (LNG) Terminals

Under the federal Natural Gas Act, the Federal Energy Regulatory Commission (FERC) approves the importation of liquefied natural gas (LNG), but the states are left to site LNG facilities in a manner that guards the state's interests in land use, public safety, and environmental protections.[16] H.R. 6 shifts this state siting authority to the federal government.

Under section 320 of H.R. 6, FERC would be granted exclusive authority to authorize the construction, expansion, and operation of LNG terminals. State efforts to protect public safety or to address ratepayer and environmental concerns would be preempted. While the bill requires FERC to consult with state and local governments, they would have no role in the final decision, and FERC would not be required to address their concerns. State and local governments would also lose the ability to impose penalties for safety violations at LNG facilities.

This provision has significant practical implications for state authority. More than 20 applications for LNG terminals are pending before FERC and the Coast Guard, and an additional eight potential locations for LNG terminals have been identified by the LNG industry.[17] Each of these applications raise significant safety concerns, including the possibility of a highly destructive explosion in the event of a terrorist attack.[18] Yet under section 320, state governments would lose their authority to protect state residents from these potential dangers.

Section 320 has been opposed by state officials from both West Coast and East Coast states, as well as by the National Governors Association, and the National Association of Attorneys General.[19]

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16 FERC has attempted to unilaterally assert jurisdiction over LNG facilities, and has been sued by the state of California since the FERC action deviates from the plain language of the Natural Gas Act.

17 Federal Energy Regulatory Commission, *Existing and Proposed North American LNG Terminals* (July 1, 2005) (online at www.ferc.gov/industries/lng/indus-act/exist-prop-lng.pdf); Federal Energy Regulatory Commission, *Potential North American LNG Terminals* (June 30, 2005) (online at www.ferc.gov/industries/lng/indus-act/horizon-lng.pdf).

18 Sandia National Laboratories, Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water (Dec. 2004).

19 Letter from Governors Schwarzenegger (R-CA), Blanco (D-LA), Carcieri (R-RI), Romney (R-MA), Minner (D-DE), and Codey (D-NJ) to Chairman Domenici and Senators Bingaman, Alexandar, and Dorgan (May 25, 2005); Letter from Raymond C. Scheppach to Chairman Domenici and Senator Bingaman (Jun. 21, 2005); Letter from

The Senate energy bill contains similar, though less sweeping, provisions. Under section 381 of the Senate bill, FERC "shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of facilities located onshore or in State waters for the import of natural gas from a foreign country or the export of natural gas to a foreign country."[20] An exception provides that states could exercise any permitting or regulatory authority recognized under the Coastal Zone Management Act, Clean Water Act, and Clean Air Act.[21]

3. Preemption of State Authority over Oil Refinery Siting

Consistent with the strong tradition of local control over land use, states and localities generally control the siting and permitting of large industrial facilities, including petroleum refineries. Among the most important powers exercised by state and local governments are the powers to issue or deny permits under the federal Clean Air Act, Clean Water Act, and waste disposal laws. H.R. 6 significantly diminishes these state authorities over new and expanded oil refineries in many urban and industrial areas.

Sections 371-379 of H.R. 6 direct the Department of Energy (DOE) to designate "Refinery Revitalization Zones," which are defined as any area that (1) experienced significant job loss in manufacturing or contains an idle refinery and (2) has unemployment levels at least 10% above the national average.[22] Considering just 2004 data, there are 135 metropolitan areas alone, not including counties, that could likely qualify.[23] For a refinery project within these areas, DOE would, upon request of the permit applicant, become the lead agency with the final authority on permit decisions, including those made by states and localities under federal laws like the Clean Air Act and the Clean Water Act.[24] DOE would establish deadlines for action by other agencies, including states and localities, and would maintain the exclusive record of decisions made by those

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Michael Peevey, Chairman, California Public Utilities Commission to Representative Anna Eshoo (Apr. 11, 2005).

[20] H.R. 6 (Senate-passed version) § 381 (amending section 3 of the Natural Gas Act (15 U.S.C. § 717(b)).

[21] *Id.*

[22] H.R. 6 (House-passed version) § 374.

[23] See Congressional Research Service, Memorandum to Honorable Hilda Solis on Area Unemployment Rates at Least 110% of 2004 National Average (Apr. 4, 2005).

[24] H.R. 6 (House-passed version) § 377.

agencies.[25] If any federal or state agency denies a permit or misses a deadline, DOE could override the agency's decision and issue the permit.[26]

These sections preempt important state and local authorities. According to state and local air quality officials, these provisions could allow DOE to override state and local authorities "even if … the application fails to comply with environmental protection requirements or if the applicant has not submitted, or did not submit in a timely fashion, adequate information upon which to base a decision that is appropriately protective of public health and air quality."[27] Furthermore, DOE could hold refineries in revitalization zones to a lesser standard than must be met by other industries in the same area, which would continue to be governed by the state agencies responsible for administering the relevant statutes. This could make it more difficult for states to comply with Clean Air Act and other environmental requirements.[28]

The Senate energy bill does not contain any comparable provisions.

4. Limitation on State Authority to Require Clean Fuels for Motor Vehicles

The Clean Air Act allows states to require that gasoline and diesel fuel meet state "clean fuel" standards that are more stringent than federal standards if the states can demonstrate that the more stringent state standards are necessary for an area to meet the health-based air quality standards.[29] H.R. 6 sharply limits these important states' powers to require cleaner burning motor vehicle fuels.

Section 1541 of H.R. 6 bars EPA from approving — and hence bars a state from adopting — a new requirement for cleaner burning fuel unless: (1) the fuel would not increase the total number of fuel formulations in existence in 2004; and (2) use of the same fuel is already required elsewhere in that petroleum distribution

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25 *Id.*

26 *Id.*

27 Letter from S. William Becker, Executive Director, State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officers to Chairman Joe Barton (Apr. 11, 2005).

28 Letter from R. Steven Brown, Executive Director, Environmental Council of the States to Chairman Joe Barton and Ranking Member John Dingell re: H.R. 4517 (Jun. 14, 2004). *See also* Letter from S. William Becker, Executive Director, State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officers to Chairman Joe Barton (Apr. 11, 2005).

29 *See* CAA § 211(c)(4)(C).

district. In practice, this would halt state requirements for any new and innovative types of clean burning fuels. It would also block some areas from requiring clean burning fuel formulations that are used in other parts of the country.

Section 1541 also allows EPA to suspend existing state clean fuel requirements under vaguely defined "extreme and unusual fuel and fuel additive supply circumstances."[30]

This repeal of state clean fuel authorities has been strongly opposed by state and local air pollution officials. According to these officials, requiring cleaner burning gasoline or diesel fuel is often one of the most cost-effective and least burdensome ways for states and localities to clean up their air and meet the health-based national air quality standards.[31] They have stated that the provision in H.R. 6 would "sharply curtail current state authority" that is "critical to protecting … citizens from air pollution."[32]

The Senate energy bill does not contain any comparable provisions.

5. Preemption of State Authority to Regulate Leaking Underground Storage Tanks

In the 1980s, Congress created the Leaking Underground Storage Tank (LUST) program under the Resource Conservation and Recovery Act to prevent and clean up leaks from underground storage tanks. To supplement this federal effort, many states developed "tagging" programs to prevent gasoline or other fuels from being delivered to tanks suspected of leaks or that were otherwise considered dangerous by the states. Under these state programs, it became illegal for any person to deliver fuel to an underground storage tank bearing a state tag. According to the Government Accountability Office, 24 states have established programs to tag underground storage tanks in order to identify ineligible storage tanks for fuel delivery.[33]

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30 H.R. 6 (House-passed version) § 1541(a).

31 *See* State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials, *Air Pollution Topics – Vehicles and Fuels* (online at www.4cleanair.org/TopicDetails.asp?parent=27#docs-Fuels).

32 Letter from S. William Becker, Executive Director, State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officers to Chairman Joe Barton (Apr. 11, 2005).

33 General Accounting Office, Recommendations for Improving the Underground Storage Tank Program (Mar. 5, 2003) (online at www.gao.gov/new.items/d03529t.pdf).

Section 1527 of H.R. 6 establishes a new overarching federal fuel delivery prohibition program to ensure all states have a program to tag ineligible tanks. However, section 1527 would also require that all states adopt a special exemption for rural areas or lose their LUST funding. Under section 1527, a state could not tag an underground storage tank in a rural area if the tag would jeopardize access to fuel, unless the federal EPA Administrator determines that there is "an urgent threat to public health."

This provision is a significant reduction of state authority. In California, for instance, local fire departments can tag a tank if the owner has tampered with a leak detection alarm or has otherwise acted in a recalcitrant manner.[34] This reasonable state authority would be preempted by section 1527.

The Senate energy bill does not contain any comparable provisions.

6. Preemption of State Energy Efficiency Standards

Several states have adopted or are considering adopting standards to increase the energy efficiency of ceiling fans. Maryland has set energy efficiency standards for ceiling fans; New York expects to issue such standards next year under legislation awaiting the governor's signature; similar legislation is under consideration in six other states; and California has set labeling requirements for ceiling fans.[35] These states are acting because ceiling fans with lights can use as much energy as dishwashers, refrigerators, or window air conditioners.[36] The American Council for an Energy Efficient Economy calculates that if all states were to adopt standards comparable to Maryland's, the nation would save $13

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[34] Cal. Code Regs. Title 23, Division 3, Chapter 16, Underground Tank Regulations § 2717 (June 12, 2004).

[35] *Ceiling Fan Debate Highlights Controversy Over Energy Efficiency,* Associated Press (Apr. 12, 2005); Northeast Energy Efficiency Partnerships, *An Update on Energy Efficiency Standards Legislation in the Northeast* (2005) (online at www.neep.org/newsletter/2Q2005/standards.htm); California Energy Commission, *Appliance Efficiency Regulations*, CEC 400-2005-012 (Apr. 2005) (online at www.energy.ca.gov/2005publications/CEC-400-2005-012/CEC-400-2005-012.PDF). Maryland has set energy efficiency standards and labeling requirements for ceiling fan lights, California has set test procedures and labeling requirements for ceiling fans' energy use, and legislation is under consideration in Connecticut, Massachusetts, Maine, Rhode Island, New Jersey, and Vermont. *Id.*

[36] *Ceiling Fan Debate Highlights Controversy Over Energy Efficiency,* Associated Press (Apr. 12, 2005); see also Calwell, C. and Horowitz, N., Home Energy Magazine, *Ceiling Fans: Fulfilling the Energy Efficiency Promise* (Jan/Feb 2001) (online at hem.dis.anl.gov/eehem/01/010113.html).

billion in net economic benefits over about 20 years and would eliminate the need for 20 mid-sized power plants.[37]

Section 135 of H.R. 6 preempts these state standards for ceiling fans and ceiling fan lights as of January 1, 2006. While the section establishes minimal federal requirements for ceiling fans, those requirements would not produce any measurable energy savings.[38] Most fans already meet the requirements specified in section 135, and the requirements fail to address the energy use of ceiling fan lights, which are responsible for 70% of the energy use.[39] Also, while section 135 gives DOE authority to set more stringent standards for ceiling fans (but arguably not ceiling fan lights), it does not require DOE to act.

State officials have opposed this preemption of their authority. California Governor Arnold Schwarzenegger has called on Congress to "[p]reserve the ability of States to set higher energy efficiency standards than the federal level."[40]

The Senate energy bill does not contain any comparable provisions.

7. Limitation of State Authority over Management of Coastal Energy Projects

The Coastal Zone Management Act (CZMA) provides for joint state-federal management of the nation's coastlines, including the Great Lakes. H.R. 6 significantly curtails these important state authorities by limiting the effectiveness of state input during appeals under the CZMA.

Under the CZMA, states develop comprehensive plans for the management of state coastal areas. Currently, 34 states and territories have approved coastal management plans. Before a federal agency can issue a permit for activities within, or reasonably expected to affect, a state's coastal zone, the project applicant must certify that the activities are consistent with the state's plan. If a state determines that the activity is not consistent, the proposal must be revised to comply with the state plan. For instances where states object to an applicant's

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37 American Council for an Energy Efficient Economy, *House Energy Bill Seeks to Handcuff States*; Senate Bill (Sec. 135) *Will Save Energy and Protect the States' Energy-Saving Role* (undated).

38 *Id.*

39 *Id.*

40 Letter from Governor Arnold Schwarzenegger to Chairman Pete Domenici and Senator Bingaman (May 13, 2005).

consistency certification, the proponent of the project may appeal the state's objection to the Secretary of Commerce.

Section 330 of H.R. 6 restricts the information that can be considered by the Secretary of Commerce when a project applicant appeals a state decision regarding an energy project or activity. This section specifies that the Secretary of Commerce must use as the "exclusive record" for the appeal, the record compiled by the federal agency. Under section 330, the Secretary cannot consider the other evidence that led the state to determine that the activity was inconsistent with the state management plan. This section also limits the record that a court can consider when considering challenges to oil and gas exploration and development projects on the outer continental shelf.[41] According to the California Coastal Commission, these provisions are "directly contrary to California's strong interest in safeguarding its precious coastal resources from offshore oil and gas drilling-related activities."[42]

In addition, section 2013 limits the time the state and public have to comment on any CZMA appeal to 120 days for non-energy related projects, and it directs the Secretary of Commerce to rule on any appeal within 120 days after closing the record for comment. States such as California have indicated that these timeframes undermine the effectiveness of state participation, especially considering the complexity and contentiousness of the issues at stake.[43]

The Senate energy bill does not contain any comparable provisions.

8. Prohibition on State Appeals of Hydropower Relicensing Decisions

States have significant interests in the operation of hydropower dams, as dams affect water quality and quantity, fish and wildlife populations, and recreation opportunities. Currently, states protect these interests by participating in the federal proceedings that license hydropower dams (and relicense existing dams) and establish the conditions under which they must operate. While FERC issues hydropower licenses, other federal agencies, such as the Forest Service and Fish and Wildlife Service, set mandatory operating conditions to protect against environmental harms, after considering comments from states, localities, and

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41 H.R. 6 (House-passed version) § 330(c).

42 Letter to Chairman Joe Barton and Ranking Member John Dingell from Ms. Meg Caldwell, Chairperson, California Coastal Commission (Mar. 23, 2005).

43 *Id.* Letter from Mike Chrisman, CA Secretary for Resources, Cruz Bustamante, CA Lt. Gov., Alan Lloyd, Secretary of California EPA, to Reps. Waxman, Eshoo, Capps, and Solis (Apr. 4, 2005).

other interested parties.[44] H.R. 6 changes the ground rules for relicensing proceedings to give hydropower dam owners special rights to influence federal licensing decisions and reduce the states' role in the decision-making process.

Section 231 of H.R. 6 grants hydropower dam owners favored status in the license proceedings. Dam owners are allowed to propose alternatives to protective conditions identified by the Fish and Wildlife Service or other federal agencies, and the agency must accept these alternatives as long as they cost less (or improve electricity production) and are "adequately protective." The alternative conditions do not need to be equally protective as the conditions the agency initially found necessary. Effectively, the dam owners' preferred approach becomes the default, trumping the protective conditions identified by the federal agency and any alternatives recommended by states or localities.

In addition, section 231 provides hydropower dam owners the exclusive opportunity to appeal a protective condition required by a federal agency. Under this procedure, the dam owner, but no other party, can challenge factual findings made by the federal agency and demand a trial-type hearing.

Taken together, these provisions undermine state efforts to restore clean water, fish and wildlife habitat, and other beneficial uses to state rivers. Several state attorneys general charge that they would also "increase the cost and length of the licensing process" and "impose new and likely prohibitive costs on state … resource agencies."[45] These provisions have been opposed by the Governors of Oregon and Washington, and attorneys general from Maine, California, Illinois, and Tennessee, among other states.[46] According to the state attorneys general,

> State and federal fisheries and land protection managers will have far less authority to protect natural resources during licensing under the proposed bill, while at the same time an applicant's influence over the process

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44 Sections 4(e) and 18 of the Federal Power Act establish that certain federal agencies may issue mandatory conditions for FERC licenses. Sections 308 and 313(a) of the FPA provide that any interested person may participate in the administrative hearing (including rehearing) of a license or any condition therein.

45 Id.

46 Letter from Oregon Governor Theodore R. Kulongoski to Senator Gordon Smith (May 19, 2005); Letter from Washington Governor Christine O. Gregoire to Senator Maria Cantwell (May 16, 2005); Letter from Attorneys General of Maine, California, Connecticut, Illinois, New York, Oregon, Tennessee, and Wisconsin to Chairman Domenici and Ranking Member Bingaman (May 23, 2005).

> would be greatly increased. The licensing process should guarantee all parties equivalent procedural rights, as is true under current law.[47]

The Senate energy bill attempts to establish relicensing procedures that would allow states and other parties to participate on equal footing with the dam owner, but it is not clear whether the language achieves that result. Section 281 of the Senate bill explicitly provides that any party may propose an alternative to a protective condition. However, ambiguously worded language in section 281 appears to require that before the federal agency can accept such an alternative condition, the agency must concur with the dam owner's judgment that the alternative costs significantly less to implement or improves electricity production.[48] This language could effectively grant dam owners veto authority over alternatives proposed by states and other parties. Section 281 of the Senate bill grants any party, not just dam owners, the right to a trial-type hearing on disputed facts.

9. Limitations on State Participation under the National Environmental Policy Act

The National Environmental Policy Act (NEPA) allows states and localities to comment on and propose alternative approaches to federal actions such as approving, permitting, or relicensing energy-related projects and activities. Provisions in H.R. 6 would remove or limit this tool with respect to many types of federal decisions on energy.

Section 1702 changes NEPA as it applies to hydroelectric dams, geothermal projects, wind farms, and other renewable energy projects. This section would bar federal agencies from considering — and states from commenting on — any alternatives other than the project as proposed or no project at all. In addition, states and the public would be granted just 20 days to provide comments on the federal government's project evaluation and proposed decision.[49]

Also, section 2055 entirely exempts a broad range of oil and gas exploration and extraction activities on federal lands from NEPA. Projects that disturb less than five acres of land, geophysical exploration activities that do not require road building (such as the use of environmentally damaging thumper trucks), and

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[47] Letter from Attorneys General of Maine, California, Connecticut, Illinois, New York, Oregon, Tennessee, and Wisconsin to Chairman Domenici and Ranking Member Bingaman (May 23, 2005).

[48] H.R. 6 (Senate-passed version) § 281(c).

[49] H.R. 6 (House-passed version) § 1702(b) (Apr. 21, 2005).

reopening a closed and remediated drilling site, among other activities, would no longer require a review under NEPA.[50]

Another provision of the legislation, section 503, waives NEPA requirements for energy projects on tribal lands if the Secretary of Interior has approved a tribal process for reviewing such projects. The section provides no guarantee that any new tribal processes will provide comparable protections to states as does NEPA, and it does not appear to allow the state to seek redress in federal courts if those processes are violated.

These provisions severely limit the ability of states and localities to influence the design, location, and operating conditions of a wide range of energy-related activities. States and localities would be effectively banned from proposing common sense improvements to dams, geothermal projects, other renewable energy projects, and many oil and gas projects. They would also likely have less opportunity to participate in decisions about energy activities on tribal lands.

The Senate energy bill does not include the provisions regarding renewable energy projects and oil and gas drilling. However, section 503 of the Senate bill addresses energy development on tribal lands and would have the same effect as the House bill.

10. Elimination of State Authority to File Product Liability Lawsuits for MTBE Contamination

Numerous states and local governments have filed defective products suits against the manufacturers of methyl tertiary butyl ether (MTBE). MTBE is a gasoline additive that has contaminated over 2,000 drinking water supplies in 36 states across the country.[51] H.R. 6 would eliminate a primary basis for these claims.

Section 1502 of H.R. 6 establishes a "safe harbor" for MTBE producers by providing that MTBE may not be deemed to be a defective product. This would prohibit the state and local governments from asserting the legal claims that have been effective in winning approximately $300 million in clean-up costs to date.[52]

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50 H.R. 6 (House-passed version) § 2055(b) (Apr. 21, 2005).

51 Association of Metropolitan Water Agencies, *Cost Estimate To Remove MTBE Contamination From Public Drinking Water Systems In The United States* (Jun. 20, 2005) (online at www.amwa.net/mtbe/amwa-mtbecostest.pdf); *State Officials Losing Fight Over Energy Bill*, San Francisco Chronicle (Apr. 21, 2005).

52 Telephone conversation between Association of Metropolitan Water Agencies and Government Reform Committee minority staff (July 18, 2005).

Since product liability claims are premised on state statutory and common law, the MTBE waiver in section 1502 preempts these state laws.

This provision is expected to undermine more than 100 lawsuits by states, counties, towns, villages and water agencies for cleanup assistance.[53] This would shift an estimated $32 billion in cleanup costs from industry to state and local taxpayers and ratepayers.[54]

The Senate energy bill does not contain any comparable provisions.

11. Loss of State Revenues from Royalty Reductions

When oil and gas companies drill on federal land or offshore waters, they pay a royalty to the federal government for use of the land and extraction of the public resource. A portion of these proceeds are allocated to states, which use royalty funds for public education budgets, road building, and other projects. Between 1999 and 2003, states received more than $3.7 billion from oil royalty payments.[55] H.R. 6 includes new exemptions from royalty payments that would result in reduced royalties and revenues to states.

Section 2003 of H.R. 6 authorizes reductions in royalties from "marginal" wells, as defined by the Secretary of Interior. Section 2004 reduces royalty payments from deep wells in shallow areas of the Gulf of Mexico, and section 2005 reduces royalties from deep water production. Section 2016 provides royalty relief from onshore deep wells on federal land. Section 2014 requires the federal government to reimburse companies, out of royalty collections, for costs incurred to conduct environmental impact reviews mandated under NEPA. The Congressional Budget Office (CBO) estimates that these and other provisions in the oil and gas title would reduce net royalty receipts by $815 million over ten years, at least $330 million of which would otherwise go to states.[56]

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53 Association of Metropolitan Water Agencies, *Cost Estimate To Remove MTBE Contamination From Public Drinking Water Systems In The United States* (Jun. 20, 2005) (online at www.amwa.net/mtbe/amwa-mtbecostest.pdf); *State Officials Losing Fight Over Energy Bill*, San Francisco Chronicle (Apr. 21, 2005).

54 Association of Metropolitan Water Agencies, *supra* note 52.

55 Green Scissors Campaign, *Drilling a Hole in the Treasury* (2003) (online at www.greenscissors.org/energy/oil.htm).

56 Letter from Douglas Holtz-Eakin, Director, Congressional Budget Office to Chairman Richard Pombo II, House Committee on Resources (Apr. 19, 2005).

The Senate energy bill contains royalty reductions similar in kind to those in sections 2003, 2004, 2005, and 2016 of the House bill, but does not provide for reimbursement of NEPA-related expenditures. CBO estimates that these royalty reductions, as offset by additional royalties from increased production, result in a net reduction of federal receipts of $87 million over ten years.[57] CBO did not provide an estimate of the states' share of these royalty reductions.

III. CONCLUSION

State and local governments have traditionally had a major role in energy policy, particularly as energy issues affect local communities. Despite promises by President Bush to respect state authorities, the energy bills currently under consideration in Congress — especially the House-passed bill — preempt and limit state and local authorities in 11 key areas. Under the legislation, states lose authority over siting decisions, standard setting, and management of coastal areas; their rights to participate in federal energy decisions are diminished; and their oil royalties are reduced. The net effect is a significant transfer of power over energy matters from state and local governments to federal agencies in Washington, D.C.

[57] Congressional Budget Office, *Cost Estimate: S. 10, the Energy Policy Act of 2005* (Jun. 9, 2005) (online at www.cbo.gov/showdoc.cfm?index=6423&sequence=0).